

FEDERAL CIRCUIT COURT OF AUSTRALIA

NGUYEN v MINISTER FOR IMMIGRATION & ANOR [2017] FCCA 1451

Catchwords:

MIGRATION – Application for leave out of time – review of administrative appeals decision – whether decision affected by jurisdictional error – jurisdictional error not established – application dismissed.

Legislation:

Migration Act 1958 (Cth), s.5F

Migration Regulations 1994 (Cth), cl.820.211

Marriage Act 1961 (Cth)

Applicant:	TAN KHOA NGUYEN
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	BRG 1131 of 2016
Judgment of:	Judge Vasta
Hearing date:	19 June 2017
Date of Last Submission:	19 June 2017
Delivered at:	Brisbane
Delivered on:	19 June 2017

REPRESENTATION

Solicitors for the Applicant: Essen Lawyers Pty Ltd

Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) That the Application filed 6 December 2016 be dismissed.
- (2) That the Applicant pay the First Respondent's costs of and incidental to this proceeding fixed in the sum of \$5800 (inclusive of GST).

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT BRISBANE

BRG 1131 of 2016

TAN KHOA NGUYEN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(Ex tempore)

1. By application filed on 6 December 2016, the Applicant, Tan Khoa Nguyen, asks this Court to review a decision of the Administrative Appeals Tribunal (“the AAT”) that was made on 1 December 2015. Obviously such a filing is one year and five days after the Tribunal has made its decision, and so is well after the 35-day limit that there is to file such applications.
2. The Applicant submits that this Tribunal was looking at the issue of whether he should have been given a temporary visa. But the Applicant had also applied for a permanent visa. That application was

filed before the Tribunal had decided whether the Applicant should be given a temporary visa.

3. However, part of the prerequisites for a permanent visa is that one holds a temporary visa. The delegate of the Minister had decided that he would not allow a permanent visa to be given because there was no temporary visa. The Applicant was notified about this on 3 November 2015.
4. The decision of the AAT regarding the temporary visa had been reserved for some months. It was during this period that the delegate made the decision about the permanent visa. The AAT decision regarding the temporary visa was delivered on 1 December 2015.
5. The Applicant sought a review in the AAT of the decision that had been made by the delegate in November of 2015 regarding the permanent visa. That decision was reviewed by the AAT and affirmed in November of 2016.
6. The Applicant said that upon receiving that decision, he realised that he needed to have a temporary visa before he could have a permanent visa. It was then that he made his application to this Court, wanting to review the decision not to give him a temporary visa, notwithstanding that he was well out of time.
7. The Applicant points to the fact that the application, filed on 6 December 2016, was within 35 days of receiving the AAT decision of November 2016, and, on that basis, he asks for this Court to allow the time for filing to be extended.
8. There are three aspects to the grant of leave for an extension for filing. First is to look at the excuse; second is to look at what prejudice there may be given to the Respondent if leave were granted; and thirdly is to ascertain whether or not there is an arguable case, on the merits, that ought be looked at by the Court. It is this last aspect to which I now have to direct most of these reasons.
9. The background of this matter is that the Applicant is a citizen of Vietnam. He came to this country in 2008 on a student visa. He was married at the time, and, it seems, in about 2011, whilst still on the student visa, he and his wife were divorced.

10. Soon after the divorce, the Applicant came to Brisbane to see his niece. At that time, he claims that he met the sponsor and that they, in effect, fell in love and were married within a matter of months; being married in August of 2011. In September of 2011, he lodged his claim for a partner visa and was given a bridging visa.
11. That matter was still being considered by the Department when, on 30 September 2012, the sponsor advised the Department that the relationship between herself and the Applicant had broken down and that the Applicant had been living with someone else for nine months.
12. The sponsor advised that she had been betrayed by the Applicant and expressed that he is not a genuine husband; *“just using me for the visa grant only”*. The sponsor’s representative also wrote to the Department advising that the sponsor had been the victim of deception and the Applicant had used her to obtain a visa.
13. On 23 October 2012, the Department wrote to the Applicant and invited him to comment on that information. The Applicant, via his representative, provided a response to that invitation on 13 November 2012 which indicated that he would be *“proceeding with an application for permanent residency under the family violence provision”*.
14. On 5 December 2012, a delegate of the Minister refused to grant the Applicant the visa as the delegate was not satisfied that the definition of “spouse” as defined in s.5F of the *Migration Act 1958* (Cth) (“the Act”) had been met. Accordingly, as that criterion had not been met, the Applicant didn’t meet the requirements of cl.820.211 of the *Migration Regulations 1994* (Cth).
15. The Applicant applied to the Tribunal for a review of that decision in December 2012. He provided further documentation regarding his application in February 2013, and it was not until 9 September 2014 that he attended a hearing before the Migration Review Tribunal, as it was then known.
16. On 21 January 2015, the Tribunal invited the Applicant to comment on the information it had received, being that same letter. The Tribunal also invited the Applicant to comment on information contained in movement records relating to the sponsor, that is, his former wife’s

travel to Vietnam, which appeared to be inconsistent with the evidence that he had given to the Tribunal. The Applicant provided a response on 4 February 2015. On 1 December, the Tribunal affirmed that decision.

17. The Tribunal identified that the Applicant had to establish to the Tribunal's satisfaction that he was in a spousal relationship as defined in s.5F of the Act at the time of the application and at the time of the decision. If the Applicant were in a spousal relationship at the time of the application but not in a spousal relationship at the time of the Tribunal hearing, it is then that the Tribunal can look at whether or not the reason for that relationship not being in existence was because of family violence.
18. The Tribunal accepted that the parties' marriage was valid for the purposes of s.5F of the Act, that is, that it was a marriage that was recognised pursuant to the *Marriage Act 1961* (Cth) ("the Marriage Act"). It then considered whether, notwithstanding that it was a valid marriage under the Marriage Act, the relationship between the Applicant and the sponsor was a genuine relationship.
19. The Tribunal looked at a number of issues: to start with, how the relationship developed; what sort of evidence there was as to the two of them setting a course for a genuine life together; what evidence was there as to the pooling of household resources, to the paying of bills, to the doing of normal household routines; what sort of evidence was there for matters such as driving the children to school, knowing the movements of each other; and any other aspect that the Tribunal needed to look at as to the genuine nature of the marriage.
20. The Tribunal did look extremely thoroughly at this aspect and the reasons number some 35 pages. At paragraph 106 of the reasons, the Tribunal says this:

"106. The Tribunal has had regard to all the evidence and weighed the evidence carefully. However, ultimately it is not satisfied that the relationship is genuine and continuing, or that there was a genuine and continuing relationship at the time of the application. The Tribunal has found to be inconsistent and unconvincing the evidence about the proposal and the circumstances in which the applicant and the sponsor decided to

marry and commit to a life together. There are a number of other aspects of the evidence that undermine the credibility of the Applicant's evidence about the relationship. The Tribunal has had regard to the evidence from Dr Tran and Ms McDowall, but has attached only limited weight to this as the evidence of the claimed history of the applicant's relationship with the sponsor. As discussed above, the evidence about the financial aspects of the relationship is very limited, and does little to support the claims about a committed spouse relationship. The Tribunal has accepted that the applicant and the sponsor had been living together for a short period at the time of the application, although it does not accept that this in itself demonstrates that they were in a genuine spousal relationship. It has had regard to evidence about the social aspects, although it considers this to be very limited overall. While there is limited evidence of social recognition, the Tribunal considers that this is greatly outweighed by other factors which undermine the applicant's claim about the relationship. As discussed above, the Tribunal has also considered the nature of the commitment. It has not accepted the applicant's claims about the circumstances of the relationship and has not accepted that the applicant supported the sponsor as he claimed.

107. Having carefully considered all the evidence, the Tribunal is not satisfied that the applicant and the sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others at the time of the application, or that there was a genuine and continuing relationship at that time. ”

21. With those being the conclusions, it was not at all surprising that the Tribunal then decided that it would affirm the decision of the delegate.
22. When the Tribunal referred to the evidence of Dr Tran and Ms McDowell, that evidence went to the existence of family violence and what effect such may have had on the Applicant.
23. The problem that the Applicant has identified is that the aspect of family violence was not properly looked at by the Tribunal.
24. The grounds of the application are:-

“1 The Tribunal has denied procedural fairness from breach of section 422B by not considering the claim.

Particulars

(i) The Applicant has provided evidence and materials in relation to the existence of family violence.

(ii) It did not acknowledge in its decision that a claim for family violence has been made and did not assess applicant's claim against sub clause 820.221(3)(b)(i).

At paragraph 75 of the decision record it plainly said:

“The Tribunal notes that the applicant claims to have been a victim of family violence at the hands of the sponsor.”

2. The Tribunal failed to consider relevant considerations and took into account irrelevant considerations.

Particulars:

(i) The Tribunal did not consider the Applicant's claim of family violence. It did not consider the expert's report as provision of evidence in relation to family violence, instead it considered the information as providing evidence in relation to the history of the parties' relationship and as to the genuineness of their relationship

(ii) It failed to consider that the delegate gave a significant weight to the Sponsor's written evidence, including her own written evidence given on 30 September 2012 and evidence submitted as a submission through her representatives on 02 October 2012 in relation to the genuineness of the relationship. It failed to consider that the delegate refused visa to the Applicant less than two months of receiving adverse information. At para 99 of the decision record it said:

“while the Tribunal has considered the applicant's submission and evidence, it has ultimately attached some weight to the information provided to the Department by the sponsor on 30 September 2012”.

At paragraph 56 it said that the Sponsor's evidence suggested that the Applicant had used the sponsor to obtain the grant of the visa and that he was not in a genuine relationship with her. It also said that this information might also be relevant to whether there was a genuine relationship at the time of the application and whether it was satisfied that there was relevant family violence.

(iii) It failed to consider that Sponsor's relationship with applicant was ceased at the time of providing the evidence and the reason for limited documentary evidence in relation to showing the claimed period of cohabitation was due to the abusive nature of relationship between the parties.

3. Tribunal failed to identify the critical issues in this matter.

Particulars:

(i) At paragraph 71 of the Tribunal decision records, it said the issue in the present case is whether the applicant was the spouse of the sponsor at the time of visa application.

(ii) It did not consider the critical issue in this case being whether the relationship was ceased due to family violence."

25. All three of those grounds have been particularised and they are all fixated upon this issue of family violence.
26. It is not contested that the issue of family violence, though whilst considered by the Tribunal, was not considered in the way that it would need to have been considered if the Tribunal had found that there was a genuine spousal relationship.
27. However, the Tribunal should not be considering that aspect of family violence until it has actually decided for itself that there was, in fact, a genuine spousal relationship that existed at the time of the application. The Tribunal has not found that, and so therefore the threshold for even considering family violence has not been reached.
28. The conclusion that the Tribunal came to as to whether or not there was a genuine spousal relationship in existence at the time of the application was a decision that was open to the Tribunal on the evidence that was before it. Therefore, I can see that there is no jurisdictional error.
29. The grounds upon which this application is based do not, in any way, make the existence of a jurisdictional error further known; therefore, the third aspect of whether I ought to allow leave, in my view, has not been satisfied.

30. In all of the circumstances, I am of the view that I ought refuse leave to file the application out of time.

I certify that the preceding twenty-nine (29) paragraphs are a true copy of the reasons for judgment of Judge Vasta

Date: 27 June 2017